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Northwest Farm Credit Services, FLCA v. Lake Cascade Airpark, LLC Appellant's Brief Dckt. 40992

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 40992

NORTHWEST FARM CREDIT SERVICES, FLCA,
a federally chartered instrumentality of the United States of America,

Plaintiff-Respondent,

v.

LAKE CASCADE AIRPARK, LLC, an Idaho limited liability company;
DONALD MILLER and CANDACE W. MILLER, husband and wife,

Defendants-Appellants,

and

DAVID A. BUICH and KAREN L. BUICH, husband and wife,

Defendants.

BRIEF OF APPELLANTS LAKE CASCADE AIRPARK, LLC AND DONALD AND CANDACE MILLER

Appeal from the District Court of the Fourth Judicial District for Valley County
Case No. CV-2012-33
The Honorable Thomas F. Neville, District Judge

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I. STATEMENT OF THE CASE

A. Nature Of The Case

This appeal asks whether the district court clearly erred when establishing the reasonable value of real property once owned by Appellants Lake Cascade Airpark, LLC ("Lake Cascade Airpark") and Donald and Candace Miller (the "Millers").[1] Respondent Northwest Farm Credit Services ("NFCS") brought a foreclosure action against Appellants and sought a deficiency judgment based on its appraisal that found the property was no longer developable, was valuable only as agricultural grazing land, and was worth $4,001 per acre or $1,335,000. Finding that appraisal credible, the district court agreed the property only has value as agricultural land. While so, the district court found the appraisal "a bit on the low side" and, without further explanation, established the property's reasonable value as $1,501,500 or $4,500 per acre.

Resting as it does on NFCS's appraisal, the district court's finding that the property should be valued only as agricultural land was clearly erroneous. Substantial evidence showed the property is uniquely situated for development as a wetland mitigation bank authorized under the Clean Water Act and that sellable credits from the bank would have great value in Idaho—well in excess of $4,500 per acre. By failing to take that evidence into account, the district court accepted and relied on assumptions made by NFCS regarding the feasibility of a wetland mitigation bank on the property, and thus the value of the property, that were plainly wrong. Because the district court clearly erred when it found the property is valuable only as agricultural

[1] Lake Cascade Airpark and the Millers are, at times, referred to collectively as "Appellants."

land, this Court must reverse the finding that the property is valued at no more than $4,500 per acre or $1,501,500.

B. Course Of Proceedings

On February 6, 2012, NFCS filed a complaint to foreclose real estate mortgages against Lake Cascade Airpark, the Millers, and David and Karen Buich (the "Buichs"). R. 9-37.[2] The complaint sought to hold each defendant in default on two loan agreements, to foreclose the mortgages securing those loans, and the entry of a deficiency judgment. R. 17-19. Appellants answered, R. 38-42, as did the Buichs, R. 43-46. On August 27, 2012, the district court entered partial summary judgment in favor of NFCS, finding Appellants and the Buichs were in default on the loans and that NFCS was entitled to foreclose on the mortgages. R. 51-53. The district court also found that genuine issues of material fact existed with respect to the amount due and owing on the loans and the reasonable value of the mortgaged property. R. 52. The district court thus denied summary judgment on those issues. *Id.*

On September 25, 2012, the two remaining issues were tried to the district court. The Buichs did not participate, having stipulated to the entry of a default judgment against them. R. 59; Tr. 10:23-11:21. At trial, there was also no dispute on the amounts owed on the loans. The following day, the district court entered its Partial Findings and Conclusions pursuant to Idaho R.

[2] In this brief, the Clerk's Record on Appeal is cited as "R." and the transcript from the September 25, 2012 trial is cited as "Tr." The exhibits admitted at the trial are cited as "Ex." Because the trial exhibits are compiled and numbered sequentially, the page number of the compilation is cited, as opposed to the page number of the exhibit itself. For instance, "Ex. (H) at 37" refers to Exhibit H and page 37 of the compilation of exhibits, not page 37 of Exhibit H.

Civ. P. 52(a). R. 58-65. The district court found Appellants and the Buichs owed a total of $3,532,277.04, with interest accruing at a total daily rate of $859.66. R. 61. The district court also found that the mortgaged property had a "reasonable or fair market value of $4,500 per acre or $1,501,335.00, rounded to $1,501,500.00, as of September 25, 2012." R. 64.

On November 2, 2012, the district court entered a Decree of Foreclosure and Order of Sale. R. 66-69. Thereafter Appellants moved to amend the district court's Partial Findings and Conclusions pursuant to Idaho R. Civ. P. 52(b) and 59(e) and for a new trial pursuant to Idaho R. Civ. P. 59(a)(6). R. 70-71. The district court heard and denied those motions. R. 393-403. After purchasing the property at a sheriff's sale, NFCS moved for the entry of a deficiency judgment. *See* R. 7. On March 19, 2013, the district court entered a Judgment in favor of NFCS, establishing the deficiency owed by Appellants and the Buichs as $2,105,986.16, plus interest. R. 412-13. Appellants filed their Notice of Appeal on April 29, 2013. R. 416-19.

C. Statement Of Facts

1. Lake Cascade Airpark Acquired The Subject Property Because Of Its Proximity To Cascade Airstrip And Developmental Potential.

In 2004, the Millers formed Lake Cascade Airpark with the Buichs for the purpose of acquiring real property in Valley County, Idaho, on and around the Cascade Airstrip. Tr. 86:22-87:2, 90:1-12. That same year, Lake Cascade Airpark purchased a large parcel of property directly adjacent to the airstrip. *See* Tr. 89:13-90:12. The property—which is the subject of this appeal—sits to the north of the town of Cascade and south of Donnelly, just to the east of

Cascade Reservoir.[3] *See* Ex. (H) at 31, 36, 53. It totals 333.63 acres and is irrigated pasture land. Ex. (H) at 31, 36. The property is zoned Multiple Use-Agriculture, which allows for single family dwellings and agricultural uses. Tr. 35:25-36:16; Ex. (H) at 37, 39.

Lying between the subject property and the eastern shore of Cascade Reservoir is 200 acres of reserve interest deed lands—which is commonly referred to as a permanent agricultural easement—also held by Lake Cascade Airpark. Tr. 82:2-21, 84:1-7. The Cascade Airstrip sits on the 200-acre agricultural easement. Tr. 82:2-21. It is a recreational airstrip that is currently inactive. Tr. 81:20-82:1, 112:1-16. The proximity of the Cascade Airstrip and the developmental potential of lands adjacent to the airstrip led Lake Cascade Airpark to purchase the subject property. Tr. 89:13-20, 90:13-91:1. Through Lake Cascade Airpark, the Millers and the Buichs planned to develop the west side of the property, the land closest to the airstrip, into an airpark with a residential unit per two acres, consistent with its zoning. Tr. 90:13-91:1, 91:23-94:22; *see also* Ex. (2) at 78, 86.

2. The Subject Property Is Also Uniquely Suited For Development As A Wetland Mitigation Bank Under The Clean Water Act.

The subject property also has other attributes: over 200 acres comprising the east side of the property is uniquely suited for development as a wetland mitigation bank. Tr. 91:7-16, 125:5-126:5, 127:6-17; *see also* Ex. (2) at 78. In 2006, the Idaho Transportation Department ("ITD") approached Lake Cascade Airpark regarding the property and its potential as a wetland

[3] Cascade Reservoir is also known as Lake Cascade, which is its common and official name. For the sake of clarity, it is referenced in this brief as "Cascade Reservoir."

mitigation bank under the Clean Water Act, 33 U.S.C. § 1301, *et seq.* Tr. 95:23-61:1, 97:21-98:5. The Clean Water Act requires compensatory mitigation for the purpose of offsetting impacts to the waters of the United States authorized under Section 404 of the statute, 33 U.S.C. § 1344. *See* Tr. 121:1-122:22; *see also* 40 C.F.R. pt. 230, subpt. J; 33 C.F.R. pt. 332. One way Section 404 permittees, such as ITD, can meet that requirement is purchasing mitigation credits from a wetland mitigation bank. Tr. 121:20-122:6; *see also* 40 C.F.R. §§ 230.93(b)(2), 230.98; 33 C.F.R. §§ 332.3(b)(2), 332.8.

A wetland mitigation bank is a site where wetlands are established, restored, enhanced, or preserved. 40 C.F.R. § 230.92 (defining "mitigation bank"); 33 C.F.R. § 332.2 (same); *see also* Tr. 121:1-122:22. Mitigation banks are created with the approval of the Army Corps of Engineers and the United States Environmental Protection Agency ("EPA"). Tr. 121:1-11; 40 C.F.R. § 230.98; 33 C.F.R. § 332.8. Once established, credits from the bank are sold to Section 404 permittees within distinct service areas, in this case within the Payette River, Weiser River, and Boise River drainages. 40 C.F.R. §§ 230.93(b)(2), 230.98; 33 C.F.R. §§ 332.3(b)(2), 332.8; Tr. 101:6-14, 134:5-12. Mitigation credits are very valuable. The evidence at trial showed that ITD recently purchased three to four acres' worth of emergent wetlands for approximately $25,000 per tenth of an acre. Tr. 130:18-131:5. Also, the City of Boise had purchased credits for $4.50 per square foot or approximately $180,000 per acre. Tr. 106:17-107:20. Although fairly new, the market for mitigation credits already exists in Idaho. Tr. 131:6-13, 134:5-16.

After meeting with agency stakeholders, Lake Cascade Airpark commissioned feasibility studies and prepared a prospectus, which is the first level of approval for banking wetland

mitigation credits. Tr. 98:6-15, 101:6-102:1, 123:10-19; 40 C.F.R. § 230.98(d)(2); 33 C.F.R. § 332.8(d)(2). As part of those efforts, Lake Cascade Airpark hired James Fronk, among others, to investigate the property and determine whether it met the criteria for a wetland mitigation bank. Tr. 123:10-19. Fronk is the owner of Secesh Engineering and is an Army Corps of Engineers certified wetland delineator. Tr. 117:3-118:5. Over the past 20 years, he has evaluated over 200,000 acres of wetlands in Valley, Adams, and Ada Counties using the Clean Water Act process and constructed approximately 100 acres of wetlands. Tr. 118:18-120:25.

Fronk conducted a wetland delineation of the property, prepared a soil analysis, and monitored groundwater, among other activities, over the course of two years between 2007 and 2009. Tr. 123:25-124:25. Lake Cascade Airpark spent over $150,000 for that work. Tr. 103:17-20. Fronk and representatives of the stakeholder agencies concluded that the property was "a prime spot for a wetland bank." Tr. 125:5-13. That is largely because of the property's location within a large drainage, its proximity to Cascade Reservoir, the prehistoric drainages that run to the middle of the property, its high groundwater levels, and the ability of wetlands on the property to be self-sustaining. Tr. 125:14-126:5, 127:6-17. Lake Cascade Airpark identified 283 acres on the east side of the property as suitable for development as a wetland mitigation bank. *See* Tr. 91:9-16, 98:16-24.

3. In May 2008, NFCS Appraised The Subject Property To Underwrite Loans And Found It Was Valued At $15,406 Per Acre Or $5,141,040.

In the meantime, Lake Cascade Airpark refinanced its loan on the subject property. On May 27, 2008, it obtained a $2,450,000 term loan and a $500,000 operating line of credit from

NFCS. *See* Exs. (A) at 2-6, (D) at 14-16. The property secured the loans. *See* Exs. (B) at 7-11, (E) at 17-21. Before underwriting the loans, NFCS asked Susan Robbins, an appraiser employed by NFCS, to appraise the property. Tr. 21:1-8; Ex. (2) at 70. Robbins is a general appraiser certified in Idaho and Oregon and is also an accredited rural appraiser with the American Society of Farm Managers and Rural Appraisers. Tr. 21:25-22:6. She has never appraised property with wetland mitigation bank credits available. Tr. 62:22-25.

On May 12, 2008, Robbins completed her appraisal report and found the subject property, as a whole, was valued at $15,406 per acre or $5,141,040, with a marketing exposure of six to 12 months. Ex. (2) at 72; Tr. 65:7-12. Robbins described the purpose of the report as estimating the property's current market value in an "as in" condition, yet she also considered its developmental potential. Ex. (2) at 72, 78, 86; Tr. 69:1-7. She recognized that any housing developed on the property may be limited due to zoning constraints but also noted that the "county, state and Bureau of Reclamation ... are in approval of this future development." Ex. (2) at 78. She also found that "[t]he wet land mitigation bank may have some impact" on the western side of the property. Ex. (2) at 81.

At trial, Robbins defended the values found in her 2008 appraisal, describing the market at that time as "very active." Tr. 71:4-21. But her report does not support that assessment. Her report acknowledges that the real estate market had stabilized in 2006, 2007, and 2008, with an influx of properties listed for sale but no comparable sales in 2007 and 2008. Ex. (2) at 75, 82. Further, she noted that Tamarack Resort, a resort directly across Cascade Reservoir from the subject property—and the stimulus for an active real estate market in the area during 2004 and

2005—declared bankruptcy months earlier in February 2008. Ex. (2) at 74-76. Robbins found "[t]he market is prone for an adjustment in prices," even though the adjustment was yet unknown due to the lack of sales in recent years. Ex. (2) at 75.

Nevertheless, based on the downward trend in the market, Robbins made adjustments in valuing the property, while still recognizing and considering the developmental potential of the property. She evaluated the property as two separate land components: (1) the west side of the property, adjacent to the Cascade Airstrip, she considered reasonably developable as an airpark (which she deemed "Site A") and (2) the remaining acreage on the east side of the property, she considered a wetland area (which she deemed "Site B"). Ex. (2) at 81, 84-88; Tr. 65:13-66:15. Because the property had two land components, she used a cost approach valuation method, which "considers the land value based on comparable bare land sales comprised of similar land classification." Ex. (2) at 81.

Robbins used nine comparable sales from 2003 to 2006: one from 2003, four from 2005, and four from 2006.[4] Ex. (2) at 84-87. She found four of those sales comparable to Site A, with sales ranging from $37,999 per acre to $63,650 per acre.[5] Ex. (2) at 87, 84-85. However, she

[4] Robbins' report identifies nine comparable sales; however the fifth and ninth sales (of 156.92 acres, dated June 2005) are the same. *See* Ex. (2) at 84-85. In addition, the first sale is dated August 2007, but Robbins noted that the sale "was negotiated in 2006 but closed in 2007." Ex. (2) at 82. As a result, she considered the sale as one from 2006. *Id.*

[5] Robbins identified "Sales #8, #1, #2 and #4" as comparable sales to Site A. Ex. (2) at 87. Her reference to "Sale #8," however, is actually a reference to Sale #3. *Compare* Ex. (2) at 87 (referencing Sale #8 as $63,650 per acre), *with* Ex. (2) at 84 (referencing Sale #3 as $63,653 per acre).

settled on a lower value of $32,000 per acre for Site A based on "the downward trend, the risk involved in this property[,] as well as the development potential" of Site A. Ex. (2) at 87, 84. With respect to Site B, Robbins found two comparable sales, each coming in at just over $7,900 per acre, and she rounded her appraisal to $8,000 per acre.[6] *Id.* Ultimately, she arrived at a value of $15,406 per acre for the entire property or $5,141,040. Ex. (2) at 72, 84.

4. In May 2012, NFCS Reappraised The Subject Property As Part Of This Action And Found It Was Valued At $4,001 Per Acre Or $1,335,000.

Two years later, Lake Cascade Airpark was unable to complete the process for developing the wetland mitigation bank, due to financial difficulties facing the Buichs. Tr. 96:18-97:7. The mitigation bank project went on hold at that time. *See* Tr. 97:3-9, 126:6-9. The Buichs' financial problems also led Lake Cascade Airpark to fall behind on the loans. *See* Tr. 97:4-9. Lake Cascade Airpark's efforts to restructure the loans failed, Tr. 97:3-20, and NFCS declared the loans in default and filed this foreclosure action on February 6, 2012. Ex. (G) at 24-25; R. 9-37. As part of the litigation, NFCS commissioned a second appraisal of the property on May 30, 2012, again using its employee Robbins. *See* Ex. (H) at 26; Tr. 27:21-23, 31:4-6.

Robbins' appraisal of the value of the property in 2012 is very different from her 2008 appraisal. While valuing the property at $15,406 per acre per acre in 2008, she found the property's value had dropped to $4,001 per acre in 2012. *See* Ex. (H) at 31; Tr. 32:5-9. Robbins justified the reduction in value after finding the property's highest and best use was agricultural

[6] Robbins identified "Sales #3 and #5" as more comparable to Site B. As just noted in note 5, she mistakenly referred to Sale #3, meaning instead to reference Sale #8.

use (*i.e.*, "irrigated pasture land") with limited recreation influence and that the market for agricultural land was very limited. Tr. 38:1-10, 39:5-9; Ex. (H) at 37, 39. She found there was "little activity" in the real estate market in the area and 10 to 13 listings of property over 40 acres had been on the market over 100 days. Tr. 30:4-17. That told her "[t]hat there is little interest in the market right now. Few buyers, little interest." Tr. 30:16-17.

Finding few comparable sales in the market since 2008 and citing national and local economic conditions, Robbins concluded the property was not suitable for development or to be sold as development property. Ex. (H) at 33-34, 37, 39; Tr. 37:13-20. She refused to consider the potential development of a wetland mitigation bank on the property, despite using a 12- to 24-month marketing time in reaching her valuation. *Id.*; *see also* Ex. (H) at 31. Robbins testified that establishing a mitigation bank on the property was not feasible because she understood the process was time-consuming and expensive. Tr. 37:21-25, 51:5-52:1. She also testified that over 600,000 acres of wetlands already existed in Valley County, that those wetlands could be purchased as credits, and that, in any event, she was not aware of a market for the credits in Valley County. Tr. 53:19-54:12.

All of that led Robbins to evaluate the property as 333.63 acres of irrigated pasture land, rather than as two separate land components, as she did in 2008. Ex. (H) at 39-43. Robbins also chose not to use a cost valuation approach, reasoning "there are no improvements on this property and one land class." Ex. (H) at 39; *see also* Tr. 32:17-19. Instead, she used a sales comparison valuation method, using 10 sales comparisons from 2004 to 2012: three from 2004, two from 2005, and one from 2008, 2009, 2010, 2011, and 2012. *See* Ex. (H) at 39-41; Tr.

32:10-16. She found the reliability of that data "poor," Ex. (H) at 26; Tr. 58:23-59:2, and used none of the comparable sales from her 2008 appraisal, *compare* Ex. (H) at 40-41, *with* Ex. (2) at 84-85. She concluded the property's value was $4,001 per acre or $1,335,000. Ex. (H) at 31.

5. Lake Cascade Airpark And The Millers Presented Evidence Regarding The Unique Setting And Attributes Of The Subject Property, Including The Development Of A Wetland Mitigation Bank.

Appellant Donald Miller, representing Lake Cascade Airpark as well as his own interests, also testified at trial. Miller has an extensive background in commercial development in Idaho and elsewhere, as well as experience in environmental reclamation projects. Tr. 76:13-80:9. Miller's familiarity with the subject property, which began in 1989, stemmed from its proximity to the Cascade Airstrip and continued with his ownership of the property. Tr. 81:15-82:7, 84:10-89:25. Miller testified that the property would be best utilized as a limited air park development on its west side and as a wetland mitigation bank on its east side. Tr. 98:16-24. He testified that given those attributes, the property should be valued as at least $4,500,000. Tr. 107:22-108:17.

Miller also testified that little of the work already done on the wetland mitigation bank project would have to be redone. Tr. 101:6-103:25. According to Miller, the project could be completed in no more than a year's time and could be worth between $90,000 and $130,000 per credit. *See* Tr. 104:1-5, 104:18-107:20. That testimony was substantiated by Fronk. According to Fronk, the mitigation bank could be reintroduced to the Army Corps of Engineers and EPA, using the same data that had already been developed. Tr. 126:17-127:5. All that is left to do is update the site plan, obtain governmental approval, and develop the wetlands, which would take between $50,000 and $75,000 and approximately one year to complete. *See* Tr. 132:4-133:25,

127:24-128:21. And as already noted, once established, the mitigation credits are extremely valuable in a market that already exists in Idaho. *See* Tr. 130:18-131:13, 134:5-16.

6. The District Court Found NFCS's Valuation Of The Subject Property Credible And Concluded The Reasonable Value Of The Property Was $4,500 Per Acre Or $1,501,500.

The day following trial, the district court entered its Partial Findings and Conclusions. R. 58-66. The district court found the property had "a significant wetland component," and that while the wetland mitigation bank had not been completed, "[i]t is undisputed that part of the property has future potential as a source of wetland mitigation." R. 61. Despite that, the district court accepted Robbins' finding that "the property's former recreational and developmental potential had disappeared by 2012; its current highest and best use was agricultural." R. 63-64. In the end, the district court found that NFCS's valuation was "more in touch with the reality of the marketplace" and that "Mr. Miller's opinion has a large component of wishful thinking ...." R. 64. Even so, the district court also found Robbins' appraisal "a bit on the low side." *Id.* The court concluded that the "property in its current condition and in the current market has a reasonable or fair market value of $4,500 per acre or $1,501,335, rounded to $1,501,500.00, as of September 25, 2012." *Id.*

The district court sustained those findings when denying Lake Cascade Airpark and the Millers' motions to amend the findings and judgment under Idaho R. Civ. P. 52(b) and 59(e) and for a new trial under Idaho R. Civ. P. 59(a)(6). R. 393-403. With respect to the motions to amend, the district court reiterated its belief that "[b]y September 2012 [the property] was valuable only as farm or ranch land, regardless of any hope that the property might again become

ripe for vacation or residential development at some indefinite future date or that it eventually might have additional value if wetland credits actually were established." R. 398. For similar reasons, the district court denied the motion for a new trial. R. 400-02. The court found its "original decision was in accord with the law, the facts, the right, and the justice of the case," emphasizing its opportunity to consider the evidence presented at trial and ability to reweigh that evidence. R. 402 ("[A] retrial would not produce a different result.").

II. ISSUES PRESENTED ON APPEAL

1. Did the district court commit clear error in finding the subject property was valuable only as agricultural land and that the property's reasonable value was no more than $4,500 per acre or $1,501,500?

2. Did the district court abuse its discretion when it denied Appellants' motions to amend and their motion for a new trial?

III. ATTORNEY FEES ON APPEAL

Appellants seek costs and attorney fees on appeal pursuant to I.A.R. 40 and Idaho Code § 12-120(3), respectively, for the reasons stated below in Section V.C of this brief.

IV. STANDARD OF REVIEW ON APPEAL

As Appellants, Lake Cascade Airpark and the Millers acknowledge they face a standard of review that is significantly deferential. When the trial court is the trier of fact, as here, its findings of fact will be liberally construed on appeal in favor of the judgment entered. *Lindgren v. Martin*, 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997). This Court cannot set aside a trial court's findings of fact unless they are clearly erroneous. Idaho R. Civ. P. 52(a); *Kennedy v.*

Schneider, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011). Factual findings are not clearly erroneous if they are supported by substantial and competent, although conflicting, evidence. *Kennedy*, 151 Idaho at 442, 259 P.3d at 588. Evidence is substantial if a reasonable trier of fact would accept it and rely on it to determine a disputed point of fact. *PacifiCorp. v. Idaho State Tax Comm'n*, 153 Idaho 759, 768, 291 P.3d 442, 451 (2012). It has also been said that a finding of fact becomes clearly erroneous when, after reviewing the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *State v. Roe*, 139 Idaho 18, 21, 72 P.3d 858, 861 (2003).

A trial court's decisions on a motion to amend findings or a judgment under Idaho R. Civ. P. 52(b) and 59(e) and a motion for a new trial under Idaho R. Civ. P. 59(a)(6) are treated similarly. The Court reviews a decision to deny a motion to amend under an abuse of discretion standard and will not disturb that decision where substantial and competent evidence supports the trial court's findings. *Belstler v. Sheler*, 151 Idaho 819, 823, 264 P.3d 926, 930 (2011). A decision to deny a new trial is also reviewed for abuse of discretion and will not be disturbed absent a manifest abuse of discretion. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 497-98, 943 P.2d 912, 923-24 (1997). The test for determining whether the trial court abused its discretion involves three inquiries: (1) whether the court recognized the issue as discretionary; (2) whether the court acted within the boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the court reached its decision through an exercise of reason. *Id.* at 498, 943 P.2d at 924.

V. ARGUMENT

Under Idaho law, a deficiency judgment may be obtained if a foreclosure sale does not satisfy the debt. *See* Idaho Code § 6-108. In that situation, the amount of the deficiency is limited to the difference between the amount of the unpaid debt and the reasonable value of the real property. *Id.* The statute further requires the district court to take necessary evidence to determine the property's reasonable value. *See id.*; *E. Idaho Prod. Credit Ass'n v. Placerton, Inc.*, 100 Idaho 863, 869, 606 P.2d 967, 973 (1980). The goal of that exercise is to prohibit the mortgagee from obtaining a windfall should it purchase the property at less than its actual value. *E. Idaho Prod. Credit*, 100 Idaho at 869, 606 P.2d at 973. The mortgagee should not be allowed to get "something more than a full recovery ... at the expense of the mortgagor." *Id.* (internal quotation marks and citation omitted).

A. The District Court Committed Clear Error Finding The Property Was Valued At $4,500 Per Acre Or $1,501,500.

1. Substantial Evidence Does Not Support The Finding That The Property Was Valuable Only As Agricultural Grazing Land.

The district court allowed NFCS "something more than a full recovery" when it found the property was developable in 2012 only as agricultural land and thus valued at no more than $4,500 per acre or $1,501,500. Because those findings are not supported by substantial evidence, they amount to clear error. As found by the district court, the valuation given by Robbins was "more credible" than the evidence presented by Appellants. R. 64. The district court accepted Robbins' conclusion that the property's "developmental potential had disappeared by 2012," that "its current highest and best use was agricultural," and that, as a starting point, its

value was $4,001 per acre. *See* R. 63-64. Indeed, the district court concluded that Robbins' "appraisal appears to be much more in touch with the reality of the marketplace," R. 64, and later elaborated that the property "was valuable only as farm or ranch land," R. 398.

This Court owes no deference to those findings if they are not supported by substantial evidence. *Kennedy*, 151 Idaho at 442, 259 P.3d at 588. In *Kennedy*, the Court applied that principle when it reversed a trial court's finding that the plaintiffs proved a claim of adverse possession. *Id.* at 445-46, 259 P.3d at 591-92. The trial court found the plaintiffs had proven they paid taxes on the disputed property, one of the elements of adverse possession. *Id.* at 441, 259 P.3d at 587. On appeal, the Court "carefully examine[d] the testimony upon which the district court based its factual finding that the [plaintiffs] actually paid taxes on the disputed parcel." *Id.* at 445, 259 P.3d at 591. After reviewing the record closely, the Court determined the trial court's finding was not supported by substantial evidence and was thus clearly erroneous. *Id.* at 445-46, 259 P.3d at 591-92.

Like in *Kennedy*, a review of the record here shows the district court's finding that the property was valuable only as agricultural land is not supported by substantial evidence. After finding the east side of the property had some value as a wetland mitigation bank—and evaluating it as such—in 2008, *see* Ex. (2) at 81, four years later the same appraiser reversed course when the property was in foreclosure, *see* Ex. (H) at 37, 39. Despite the fact that little had changed with respect to the development of a mitigation bank on the property, Robbins found the property was no longer feasible for such a use. *See id.* In particular, Robbins made assumptions regarding the feasibility of a wetland mitigation bank on the property that were

plainly wrong. Having no experience appraising property with mitigation credits available, Tr. 62:22-25, Robbins had no direct knowledge of compensatory mitigation under the Clean Water Act and wetland mitigation banks. Instead, she relied on conversations with two other appraisers, neither of whom testified at trial. Tr. 56:14-24, 63:12-19.

But assumptions she made based on those conversations were not supported by substantial evidence. To start, Robbins was clearly mistaken when she assumed that 600,000 acres of existing wetlands in Valley County would compete with a wetland mitigation bank on the property. *See* Tr. 53:22-54:12. Existing wetlands, in and of themselves, are not eligible for inclusion in a mitigation bank under Clean Water Act regulations. *See* Tr. 122:7-22. Only wetlands that are established, restored, enhanced, or preserved can qualify for credits. 40 C.F.R. § 230.92 (defining "compensatory mitigation" and "mitigation bank"); 33 C.F.R. § 332.2 (same). It follows that the existing wetlands in Valley County would increase the demand for a wetland mitigation bank on the property—because impacts to those wetlands require compensatory mitigation under the Clean Water Act and thus the purchase of credits from a mitigation bank to offset such impacts. *See* 40 C.F.R. §§ 230.93(b)(2), 230.98; 33 C.F.R. §§ 332.3(b)(2), 332.8. Further, only four wetland mitigation banks have been developed in Idaho. Tr. 131:6-13.

The undisputed evidence also showed that the subject property is uniquely situated for the establishment of new wetlands and a wetland mitigation bank. It was ITD, a customer of mitigation credits, that first approached Lake Cascade Airpark about the possibility of developing a mitigation bank on the property in 2006. Tr. 98:1-5. ITD's interest in the property was later borne out by Fronk's wetland delineation of the property. Fronk, whose experience

with wetland mitigation banking unquestionably eclipses Robbins', concluded the property is "a prime spot for a wetland bank" given its unique natural attributes—*e.g.*, its location within a large drainage, its high groundwater levels, and its prehistoric drainages. Tr. 125:5-126:5, 127:6-17. Agency representatives agreed with that conclusion. Tr. 125:5-13.

Robbins' assumptions about the expense and time involved to complete development of a mitigation wetland bank on the property were also proven wrong. *See* Tr. 57:6-25, 63:20-64:2. According to Fronk, the wetlands mitigation project could be reintroduced to the Army Corps of Engineers and EPA, using the same data that had already been developed. Tr. 126:6-127:5, 132:4-133:25. All that is left to do is update the site plan, obtain governmental approval, and build the wetlands. Tr. 132:4-133:25. Fronk testified that it would take between $50,000 and $75,000 and approximately one year to complete the project, Tr. 127:24-128:21, well within Robbins' 12- to 24-month marketing period for the property, *see* Ex. (H) at 31.

Fronk also explained, again contrary to Robbins' assumptions, *see* Tr. 53:19-21, that a market for the wetland credits already exists in Idaho and is not limited to just Valley County but would be positioned for sale within a service area that includes the Payette River, Weiser River, and Boise River drainages.[7] Tr. 130:18-131:13, 134:5-16. And once established, the credits are extremely valuable. As noted, the evidence showed that ITD had recently purchased credits for emergent wetlands at approximately $25,000 per tenth of an acre, while the City of Boise had

[7] That service area thus encompasses large developable areas of Valley, Boise, Gem, Washington, and Payette Counties.

purchased mitigation credits for $4.50 per square foot or approximately $180,000 per acre. Tr. 130:18-131:5, 106:17-107:20. That evidence was not refuted at trial.

Based on full record, the Court should be left with a definite and firm conviction that the subject property must be valued as a wetland mitigation bank, and not as agricultural grazing land. Assumptions made by NFCS that a wetland mitigation bank was not feasible on the property were clearly wrong. Such evidence cannot both be substantial and plainly wrong. To reach that conclusion, the Court has no need to assess the competency of Robbins' findings or reweigh the evidence as in *PacifiCorp.*, 153 Idaho at 768, 291 P.3d at 451.

In *PacifiCorp*, the Idaho State Tax Commission appealed the district court's valuation of an electric utility's taxable operating property. *Id.* at 760-61, 291 P.3d at 443-44. The district court had rejected the Commission's valuation approach and accepted the utility's approach. *Id.* at 766, 291 P.3d at 449. On appeal, the Court rejected the Commission's argument that the utility's valuation methods were incompetent and unreliable, finding substantial evidence to support those methods. *Id.* at 767-73, 291 P.3d at 450-56.

That is not the situation in this case. Appellants do not challenge the district court's assessment of Robbins' competency or her valuation methods. Instead, they challenge the evidence supporting the district court's finding that the property can only be valued as agricultural land. As *Kennedy* shows, a careful review of the record can demonstrate that a district court's findings are not supported by substantial evidence. 151 Idaho at 445-46, 259 P.3d at 591-92. Where so, such findings are clearly erroneous and subject to reversal. *See id.* Here the evidence supporting the district court's valuation of the property was not substantial, for it

was based on mistaken assumptions regarding the feasibility of a wetland mitigation bank. For those reasons, Appellants respectfully ask the Court to reverse the district court and remand this matter for further proceedings on the value of the subject property.

2. Appellants Were Prejudiced By The District Court's Finding That The Property Is Reasonably Valued As Mere Agricultural Land At No More Than $1,501,500.

This Court will not reverse the district court if an alleged error is harmless. *See* Idaho R. Civ. P. 61. The error alleged here is not harmless. In the face of substantial evidence that the subject property is uniquely suited for development as a wetland mitigation bank, it was clearly wrong for the district court to find the property was valuable only as agricultural land. Yet, on that basis, the district court found the property was valued at no more than $4,500 per acre or $1,501,500 and then set the deficiency judgment owed by Appellants as $2,105,986.16, plus interest. Had the district court properly considered the evidence regarding the property's value as a wetland mitigation bank, the deficiency would have been much less, if not completely extinguished. The record shows the value of the property as a wetland mitigation bank was worth over $90,000 per credit. *See* Tr. 130:18-131:13, 134:5-16, 104:1-107:20. That value far exceeds the district court's valuation of $4,500 per acre. The prejudice to Appellants is therefore readily apparent.

B. The District Court Abused Its Discretion When It Refused To Amend Its Findings And Grant A New Trial On The Reasonable Value Of The Property.

Because the district court clearly erred when it found the subject property's only value was as agricultural land, the district court also abused its discretion when it denied Appellants' motions to amend the findings and conclusions pursuant to Idaho R. Civ. P. 52(b) and 59(e) and

motion for a new trial pursuant to Idaho R. Civ. P. 59(a)(6). A decision on a motion to amend must be evaluated to determine if substantial and competent evidence supports the trial court's findings. *Belstler*, 151 Idaho at 823, 264 P.3d at 930. Similarly, when a motion for a new trial is based on insufficient evidence to justify the verdict, the trial court must weigh the evidence presented at trial and grant the motion only where the verdict is not in accord with its assessment of the clear weight of the evidence. *Lanham*, 130 Idaho at 498, 943 P.2d at 924.

Here, the district court recognized the discretion it is afforded in deciding motions to amend and for a new trial. R. 393-403. But as explained above, the district court's finding that the property should be valued only as agricultural land, because a wetland mitigation bank was not feasible, was not supported by substantial evidence. Rather, the clear weight of the evidence showed otherwise: the property is uniquely suited for the development of over 200 acres as a wetland mitigation bank at values in excess of $90,000 per credit and potentially much more. For that reason, the district court acted outside the bounds of its discretion and did not reach its decision through an exercise of reason.

Because substantial evidence does not support the district court's findings, the court abused its discretion in refusing to amend its findings and conclusions and to grant a new trial. For that reason too, the district court's valuation of the property must be reversed and remanded.

C. If They Prevail, Appellants Are Entitled To Costs And Attorney Fees On Appeal.

If Appellants are the prevailing parties in this appeal, they seek costs on appeal pursuant to I.A.R. 40. Appellants also seek their attorney fees on appeal pursuant to Idaho Code § 12-120(3), which provides for the recovery of attorney fees to the prevailing party in an action

involving a commercial transaction. As set forth above, the evidence at trial showed that Appellants purchased the subject property for commercial purposes, not for personal or household purposes. As such, if Appellants prevail, they are entitled to attorney fees under Section 12-120(3). *See Am. Pension Servs., Inc. v. Cornerstone Home Builders, LLC*, 147 Idaho 638, 644, 213 P.3d 1038, 1044 (2009) (awarding attorney fees on appeal pursuant to Section 12-120(3) when action involved commercial transaction).

VI. CONCLUSION

For the reasons set forth above, Appellants respectfully request the Court reverse the district court's order finding the subject property was valuable only as agricultural land and that the property's reasonable value was no more than $4,500 per acre or $1,501,500 and remand this matter to the district court for further proceedings. Appellants also request that the Court award them costs and attorney fees as the prevailing parties on appeal.

RESPECTFULLY SUBMITTED this 8th day of October, 2013.

STOEL RIVES LLP

W. Christopher Pooser
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8, 2013, I served a true and correct copy of the foregoing **BRIEF OF APPELLANTS LAKE CASCADE AIRPARK, LLC AND DONALD AND CANDACE MILLER** on the following, in the matter indicated below:

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